Supreme Court, U.S.
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No. 97-2072

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TURBOMECA, S.A., and TURBOMECA ENGINE COMPANY,

Petitioners,

v.

KYONG JU BARNETT, Individually and as Guardian Ad Litem and Next Friend of JESSIE MORGAN BARNETT, and MIA KYONG BARNETT, minor children; JAMES S. BARNETT, SR.; WANDA BARNETT; and STATE OF MISSOURI,

Respondents.

On Petition for Writ of Certiorari
to the Missouri Court of Appeals, Western District

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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Respondents have tried to derail this Court's review of this important case by a fairly transparent distortion of the post-judgment proceedings and a blatant mischaracterization of some collateral principles of law. Despite respondents' diversionary rhetoric, the issues in this case are crisply defined and properly preserved. We will use the limited space available to dissolve the roadblocks respondents have sought to erect.

1. Respondents variously argue that the payment of the judgment by petitioners and the obtaining of a release from respondents creates a jurisdictional defect, constitutes a waiver or an accord and satisfaction, and/or moots the case. This novel proposition is not supported by Missouri or federal law or by the facts of this case. As pointed out in footnote 6 of our Petition, this Court has at least twice held that the payment of a money judgment does not render a case moot or prevent this Court from considering it. *Cahill v. New York, N.H.& H.R. Co.*, 351 U.S. 183, 184 (1956); *Dakota Co. v. Glidden*, 113 U.S. 222, 224 (1885).

Even if it could be argued that a *voluntary* payment of a judgment somehow affects its appealability, respondents do not cite any authority which suggests that payment under the threat of execution is voluntary. And *Rosenblum v. Jacks or Better of America West, Inc.*, 745 S.W.2d 754, 764 (Mo. App. 1988), pointedly held that the payment of a judgment "in lieu of posting a supersedeas bond or submitting to execution" is not "voluntary" and does not preclude appellate review. In this case, respondents threatened immediate execution, and the trial court ordered the judgment satisfied in full on the date of its entry and authorized plaintiff to begin execution immediately if such payment were not made (Pet. Apdx. A-63). No amount of linguistic inventiveness could render a payment made under those circumstances "voluntary."

The private respondents cite two Missouri cases supposedly holding that a release given by A to B prevents B from suing A;

but neither *Lugena v. Hanna*, 420 S.W.2d 335 (Mo. banc 1967), nor *Farmer v. Arnold*, 371 S.W.2d 265 (Mo. banc 1963), stands for that bald proposition or has any bearing on the issues presented here. Neither of those cases dealt with a release given to acknowledge the payment of a judgment. Rather, both were decided in the context of settlements made by participants in automobile accidents before any lawsuit was initiated. The court merely held that when one of the parties involved in a two-car accident obtained a release from the other driver before any litigation was filed and without reserving the right to file suit, he was estopped from proceeding with a lawsuit against the driver who released him. As the court in *Lugena* explained:

> "Where one of the parties to an accident is charged with liability by the other, and settles the claim or takes a release, he should not thereafter be permitted to bring or pursue his action..., since... the taking of a release *without a reservation of rights* in the releasee to make a claim against the releasor constitutes an accord and satisfaction of all claims of the parties to the settlement arising out of the same accident, and the releasee is estopped from so doing." *Lugena*, 420 S.W.2d at 341, emphasis added.

Lugena and *Farmer*, therefore, are rooted in the concept of accord and satisfaction, in which two parties essentially agree not to sue each other. That is a far cry from this case. Petitioners are not pursuing a new lawsuit against respondents, but are simply seeking review by this Court of the judgment below. The releases given by respondents in this case were not an accord and satisfaction of as-yet undeveloped claims. They were simply an acknowledgment by respondents that petitioners had satisfied all their obligations to them under the judgment and otherwise. They did not purport to release petitioners' rights against respondents, and they certainly did not represent a commitment by petitioners not to seek certiorari from this Court.

Moreover, respondents' representations concerning their understanding of the circumstances surrounding the payment of the judgment are notably false, and their citation of *Lugena* and *Farmer* overlook the significant exception to the accord and satisfaction rule that is squarely applicable here. In *Lugena*, the court emphasized that the plaintiff, in settling the matter, had not reserved the right to proceed against the defendant but noted: "Had he done so, his right thereafter to proceed against [defendant] would be protected." *Lugena*, 420 S.W.2d at 338.1/

When this case was remanded to the trial court from the Court of Appeals, respondents requested immediate entry of judgment and threatened to execute instantaneously on the supersedeas bond. Petitioners indicated their willingness to pay the judgment but requested sufficient time in which to collect the funds, mostly from international sources. In return for a short grace period, respondents argued that petitioners should be required to agree not to seek a stay of the judgment pending certiorari proceedings and also should agree not to file a Petition for Writ of Certiorari. On April 17, 1998, counsel for petitioners wrote to the trial judge indicating that petitioners would not request a stay of execution, but also stating that they would not waive their right to file a certiorari petition. The court, on the record, iterated its understanding of petitioners' position:

> "THE COURT: So it is clear, whether your client makes a determination at some point even after April 28 to file a Writ of Certiorari to the United States Supreme Court, the judgment in this matter would be satisfied in some matter [sic] on April 28. Is that your position?

1/ Likewise, in *Cahill*, 351 U.S. at 183, the Court held that the case was not moot because "petitioner was informed that respondent intended to pursue its remedies notwithstanding payment of the judgment."

"MR. O'DEAR: Yes." (Addendum, p. A-2.)[2/]

Respondents thus sought a waiver of petitioners' right to seek review in this Court but were specifically advised that no such waiver would be given. Hence, under the very cases they cite, there is no bar to this proceeding. The *Lugena* rule, even if otherwise relevant, applies only when a release is given "without reservation of rights." *Id.* at 341. Petitioners specifically reserved their rights, and this case is not moot; nor does this Court lack jurisdiction.[3/]

2. The Petition does not constitute a challenge to the Missouri Court of Appeals' interpretation of *BMW v. Gore*, but rather points out that *BMW* does not cover the punitive-damages waterfront and that other significant considerations, such as fair notice, financial wherewithal, and double punishment must be factored into the due process equation.

3. The assertion that Missouri "has provided clear notice for decades that punitive damages are available in wrongful death cases" is doubly misleading. In the first place, the Missouri Supreme Court in *Bennett v. Owens-Corning Fiberglas, Inc.*, 896 S.W.2d 464 (Mo. banc 1995), which established due process requirements for aggravating circumstances damages, expressly referred to four cases spanning the era from 1962 to 1992 which held "that aggravating circumstances damages are not to be clearly distinguished from compensatory damages in the jury

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2/ Relevant portions of the transcript of post-remand proceedings before the trial court are reproduced in the Addendum, together with pertinent excerpts from counsel's letter, which was appended as an exhibit to the transcript.

3/ Respondents' argument that petitioners have "claimed the benefits" of the judgment below by requesting a credit in the still-pending *Letz* case is specious. Petitioners are simply asking not to be punished twice for the same conduct, and it takes supreme optimism to view the outflow of $40 million as a "benefit."

instructions or stated separately in the jury verdict." *Id.* at 466. Those four cases were expressly overruled in *Bennett*. *Id.* To our knowledge, the present case was the first one in Missouri history where the jury made a separate award of damages for aggravating circumstances (a/k/a punitive damages).

Secondly, the obtuse reference to "aggravating circumstances [which] may be considered by the trier of the facts" buried in § 537.090 of the Missouri Statutes, scarcely puts one on notice of the fact that punishment can be imposed, let alone that it could reach the dimensions achieved in the present case. This is particularly true as regards Petitioner TSA, which is domiciled in a country (France) which does not allow punitive damages at all. Furthermore, the fair notice required by due process contemplates not just notice of the fact of potential punishment, but also its extent. As the Court said in *BMW*, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receives fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 116 S.Ct. at 1598.

As demonstrated in the Petition, the present judgment, even as remitted, represents many, many multiples of the next largest wrongful death award in Missouri history. The $175 million punitive component of the original judgment was the first since Missouri statehood to be separately stated in a jury verdict, and the $26.5 million imposed by the Court of Appeals by way of remittitur was also wholly unprecedented. If there were ever a case demonstrating the lack of fair, reasonable notice, this is it.

4. In chiding petitioners for not establishing the extent of the extraterritorial reach of respondents' conduct, respondents have attempted to reverse the burden of proof. Since respondents were the proponents of punitive damages, they had the obligation to establish the elements of their case, including the impact of petitioners' actions on the State of Missouri and, conse-

quently, the extent to which Missouri was entitled to extract punishment. Instead of satisfying that burden, respondents' evidence actually showed the opposite, in that it focused exclusively on actions and supposed derelictions in other countries and other states. Respondents' own evidence established that there were no more than 250 Turbomeca engines in the United States (Ex. 248) and, from all that appears in the record, only one in Missouri.

5. Respondents' discussion of the net worth issue illustrates precisely why this Court's guidance is needed. Respondents intentionally injected other irrelevant financial figures into the record in order to justify speaking to the jury in terms of "billions" of dollars. Their use of sales figures was particularly inappropriate, as sales are not indicative of a company's financial condition. Even a company with substantial sales could have a minimal or even a negative net worth by reason of inefficiency, poor margins, cost overruns, or an uninsured casualty.

Respondents also attempted to distort the net worth issue at trial with an amateurishly erroneous calculation that produced a figure of $200 million, as distinguished from the $122 million figure contained in TSA's financial reports. It is not difficult to produce competent testimony on net worth, so the "fuzziness" hypothesized by respondents is illusory. But even if their net worth figure were accurate, the punitive award here is still 13.25% of that number, and the combined assessments in *Letz* and *Barnett* equal 26.5% — far beyond any penalty approved in any prior reported case.

6. Respondents suggest that the presence of insurance mitigates the excessiveness of the punitive damage punishment. The existence of insurance (which was never before the jury) is irrelevant because (a) execution could still be sought against the insured's assets, and (b) if the insurer pays the judgment, the insured will surely suffer significantly when the next premium

adjustment occurs. Indeed, in the pending *Letz* case, the plaintiffs (represented by the same counsel) acknowledged: "...defendants would still be punished to the extent they could not obtain future insurance coverage or, if so, only at a substantially higher rate, as well as the negative impact to defendants of an adverse judgment given the highly competitive nature of the world-wide helicopter engine industry, and harm to the stock value of the companies." Resp.Br., Mo. Sup.Ct. No. 80558, p.86 n.50.

7. The brief in opposition filed by the State of Missouri is perplexing because it is addressed to a non-issue. Petitioners have not challenged the constitutionality of §537.675.2, which allows the State of Missouri to collect 50% of the punitive damages awarded. Rather, the point is that the State's participation in the award triggers an examination of the extent of the punishment under the Excessive Fines Clause. The State's arguments are way off target.

On the very day our Petition was filed, this Court more precisely defined the reach of the Excessive Fines Clause in *United States v. Bajakajian*, 118 S.Ct. 2028 (June 22, 1998). There the Court held that a punitive forfeiture violates the Excessive Fines Clause if it is "grossly disproportional to the gravity of the defendant's offense." *Id.* at 2038. Contrary to the private respondents' observation, this test is not duplicative of the *BMW* due process analysis, but focuses on the ratio between the fine extracted by the State and the gravity of the defendants' misconduct which is being punished.

Since punitive damages admittedly constitute punishment, *Bajakajian* teaches that the Excessive Fines Clause necessitates a proportionality review when the State participates in the recovery, as it does in Missouri and at least eight other jurisdictions. If the guilty criminal defendant in *Bajakajian* could not be required to forfeit $357,144, it is hard to see how a penalty of

more than 74 times that amount can be constitutionally levied against a civil defendant who has never been charged with a crime, never been sued previously for product defect, and never before been involved in a fatal accident.

* * * *

Once the artificial hurdles erected by respondents are cleared away, this case emerges as a prime candidate for this Court's review so that some additional, badly-needed Constitutional clamps can be placed on the random redistribution of wealth still being carried out around the country under the rubric "punitive damages."

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

August 19, 1998

ADDENDUM

ADDENDUM

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 8
HONORABLE LEE E. WELLS, JUDGE

No. CV93-24644

KYONG JU BARNETT, et al.,
Plaintiffs,

vs.

TURBOMECA ENGINE CORPORATION, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

On Thursday, the 16th day of April, 1998; Friday, the 17th day of April, 1998; and Tuesday, the 28th day of April, 1998, the above-entitled cause came on regularly for hearing before the Honorable Lee E. Wells, Judge of Division 8 of the Sixteenth Judicial Circuit, at Kansas City.

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* * * *

[58] MR. O'DEAR: Judge, I did send to Your Honor this morning a letter dated April 17th. It is in your court file. Frankly, I would like for purpose of absolute clarity for the record to mark your copy of the letter as another exhibit in this hearing.

(Court's Exhibits Nos. 4 and 5 were marked for identification.)

MR. O'DEAR: This one page of the transcript from yesterday says nothing more than what is recited in this letter. We understood clearly that your question to us was whether we were able to agree on behalf of our clients to both of these conditions, and for the reasons that we have explained in this letter, we are unable to waive at this time the right to file a **[59]** cert petition with the U.S. Supreme Court.

I want to make clear on the record, as I said in this letter, that they haven't decided if they are going to do it. The posture of this decision came to them after last week when they asked us, okay, how much time do we have to decide this issue? It is a 90-day deadline. We've had a lot of issues to deal with, and as I advised this court yesterday, their position was, if we can get until April 28th to pay this judgment in the ordinary course, we do not intend to seek a stay for the purpose of filing the cert petition, but we don't know yet whether we'll file the actual cert petition, and we're going to have to work on that and let you know.

THE COURT: So it is clear, whether your client makes a determination at some point even after April 28 to file a writ of certiorari to the United States Supreme Court, the judgment in this matter would be satisfied in some matter on April 28th. Is that your position?

MR. O'DEAR: Yes.

* * * *

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17 April 1998

VIA HAND DELIVERY

The Honorable Lee E. Wells
Circuit Court Judge - Division 8
Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106

Re: *Barnett, et al. v. Turbomeca Engine Corporation, et al.*
Case No. CV93-24644

Dear Judge Wells:

This letter will advise the Court and the parties of the position of the Turbomeca defendants on the issues remaining open at the end of the hearing on Thursday, 16 April 1998.

First, we advised our clients that the Court indicated its inclination to delay entry of final judgment until 28 April 1998 (the date by which I told the Court the defendants would be able to satisfy the judgment) if the defendants would represent to the Court that they would not 1) move for a stay of execution for the purpose of filing a petition for certiorari with the United States Supreme Court, or 2) file a petition for certiorari with the United States Supreme Court. Our clients' position on this is as follows: The Turbomeca defendants continue to agree (as I represented to the Court on Thursday) that if the Court will postpone entry of judgment until 28 April 1998, they will not move for a stay of

execution for the purpose of filing a petition for certiorari to the United States Supreme Court. The next question is whether, in order to ensure that the Court delays entry of judgment until 28 April 1998, will the Turbomeca defendant waive their right to file a petition for certiorari to the United States Supreme Court? The answer to that question is that at this time we are unable to waive Turbomeca's right to file the petition for certiorari. The following explains why we are unable to do so.

After the Missouri Supreme Court issued its order refusing to review *Barnett,* we advised our clients that the petition for certiorari to the U.S. Supreme Court could be filed at any time within ninety days of the Missouri Supreme Court's refusal to review the case. Because of the length of this deadline, because of the complexity of the analysis and decision concerning the filing of such a petition, and because of the logistical complexity of obtaining input from all members of the consortium concerning such a decision, the clients have done very little to evaluate this issue. When we called them yesterday after our conference in chambers and asked whether they had finally decided the certiorari issue and whether they could waive the right to file the certiorari petition to ensure entry of judgment on 28 April 1998, they advised us that the decision had not yet been made and further, it could not be made in 24 hours (which is what we requested). Frankly, given the 90 day period the U.S. Supreme Court allows for filing such a petition and the other factors described above, the decision may not be made until after 28 April 1998.

* * * *

Very truly yours,

/s/ Craig S. O'Dear
Craig S. O'Dear